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SUPREME COURT, U.S.
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No. 03-1540

# In The
# Supreme Court of the United States

SONIA LaFONTAINE,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Second Circuit**

## SUPPLEMENTAL BRIEF

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## STATEMENT OF THE CASE

### *Introduction*

This Supplement to the Petition for *Certiorari*, No. 03-1540, is submitted on behalf of Petitioner Sonia LaFontaine (hereinafter "Petitioner"), pursuant to Rule 15(8) of the Rules of the Supreme Court.[1]

Sonia LaFontaine's Petition for a Writ of *Certiorari* was filed on May 11, 2004. However, subsequent to that filing, new cases directly applicable to Petitioner's case have been decided, specifically: this Court's decision in *Blakely v. Washington*, __U.S.__, 124 S.Ct. 2531 (2004); and the Second Circuit Court of Appeals's decision in *United States v. Chin,* 371 F.3d 31 (2nd Cir. 2004).

This Court's decision in *Blakely* held that sentencing guidelines enhancements that required a higher sentencing

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[1] That Rule States, in relevant part:

> **Rule 15. Briefs in Opposition; Reply Briefs; Supplemental Briefs**
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> 8. Any party may file a supplemental brief at any time while a petition for a writ of certiorari is pending, calling attention to new cases, new legislation, or other intervening matter not available at the time of the party's last filing. A supplemental brief shall be restricted to new matter and shall follow, insofar as applicable, the form for a brief in opposition prescribed by this Rule.

range based on findings by a judge, rather than a jury, and by a preponderance of the evidence, rather than beyond a reasonable doubt, violated the Sixth Amendment right to a jury trial. Here, as detailed below, Petitioner's sentence was increased substantially by such enhancements.

Also, the Second Circuit's decision in *Chin* makes clear that Second Circuit erred – by its own standards – in affirming the District Court's preclusion of evidence proffered by the defense based on concerns about the authenticity of the evidence under Rule 901, Fed.R.Evid.

***The Facts Below***

Because the Petition for *Certiorari* filed in this matter contains an extensive recitation of the facts of the case below, they will not be repeated here. Instead, those facts relevant to the arguments made in this Supplemental filing are incorporated into the arguments below.

## REASONS FOR GRANTING THE WRIT

### 1. THECOURT'S DECISION IN *BLAKELY* INVALIDATES PETITIONER'S SENTENCE

Since this Court is fully familiar with its decision in *Blakely*, it will not be discussed further. In fact, since this Court has granted *certiorari* in two cases that may, within a short period of time, resolve the question whether *Blakely* applies to the United States Sentencing Guidelines (hereinafter "Sentencing Guidelines"), and, if so, to what extent, it is respectfully submitted that the Court should hold this Petition in abeyance until the decisions in those cases are decided. *See United States v. Booker*, ___ F.3d ___, 2004 WL 1535858 (7th Cir. 9, 2004), *cert. granted*, 2004 WL

1713654 and *United States v. Fanfan*, No. 04-105 (directly from the District of New Hampshire), *cert. granted*, 2004 WL 1713655 (August 2, 2004).

As a result, this Supplemental submission will simply enumerate the specific Sentencing Guidelines enhancements that were found by the sentencing court, and not the jury, and by a preponderance of the evidence, and not beyond a reasonable doubt. Those enhancements added 27 points to Petitioner's Offense Level, thereby increasing her sentencing range from 0-6 months (Level 6 Base Offense Level) to 135-168 months (Level 33 Adjusted Offense Level).

For example, since Petitioner was convicted, after trial, of fraud offenses (conspiracy to commit mail and health fraud, and substantive mail fraud), her Base Offense Level was 6 pursuant to §2F1.1(a) of the Guidelines.

The District Court then found, by a preponderance of the evidence, that the following Sentencing Guidelines enhancements applied:

(a) a loss amount of more than $2.5 million but less than $5 million, adding 13 Levels under §2F1.1(b)(1)(N);

(b) more than minimal planning, adding two Levels pursuant to §2F1.1(b)(2);

(c) conduct involving the conscious risk of serious injury to others, adding another two Levels pursuant to §2F1.1(b)(7)(A);

(d) a leadership role in an offense that included five or more participants, adding four more

Levels under §3B1.1(a); and

(e) obstruction of justice, adding six Levels pursuant to §§3C1.1 and 5K2.0.[2]

As a result, the maximum of Petitioner's sentencing range was increased by a factor of *28* (from six months to 168 months). Her minimum range was increased infinitely – from zero months to 135. Ultimately, her Guidelines sentence of 135 months' imprisonment was achieved only by making the sentences on certain counts consecutive to the sentences on other counts.

Consequently, the impact of the Sentencing Guidelines enhancements to which Petitioner was subjected due to a judge's findings made by the preponderance of the evidence standard, and which resulted in a 27-Level increase in her Guidelines range, was substantially more severe than that held unconstitutional in *Blakely*.

Accordingly, it is respectfully submitted that if the Court, in *Booker* and *Fanfan*, finds *Blakely* and its principles applicable to the Sentencing Guidelines, it should summarily remand this matter for re-sentencing consistent with those opinions.[3]

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[2] Two levels were attributable to the "Obstruction of Justice" enhancement in §3C1.1, and the additional four points represented an upward departure imposed pursuant to §5K2.0.

[3] Of course, Petitioner also has sought *certiorari* on issues that address the merits of her convictions, and which should also precipitate summary reversal under this Court's

## 2. THE SECOND CIRCUIT'S DECISION IN *UNITED STATES V. CHIN*

Petitioner argued below, and in her Petition for a Writ of *Certiorari*, filed with this Court on May 11, 2004, that the District Court, in precluding tape recordings proffered by the defense on the ground that they were insufficiently authenticated, denied Petitioner her Fifth Amendment right to present a defense.

On June 2, 2004, the Second Circuit Court of Appeals decided *United States v. Chin,* 371 F.3d 31 (2nd Cir. 2004). In *Chin,* the District Court refused to admit credit card receipts proffered by the defense in support of an alibi defense. The District Court precluded the evidence because it questioned the authenticity of the receipts, stating that the defendant "offer[ed ] no evidence by any witness to show that . . . his signature was placed on them at the time and place he proffers." *Chin*, 371 F.3d at 36.

However, the Second Circuit reversed the conviction in *Chin* and ordered a new trial, finding that the District Court should have admitted the credit card receipts with an instruction to the jury as a guide in determining their reliability. *Chin*, 371 F.3d at 42.

In doing, the Second Circuit reaffirmed that Rule 901, Fed.R.Evid, "'does not erect a particularly high hurdle,' and that hurdle may be cleared by 'circumstantial evidence.'" 371 F.3d at 37, *quoting United States v. Dhinsa*, 243 F.3d 635,

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decision in *Crawford v. Washington*, 542 U.S. ___, 124 S. Ct. 1354 (2004), or the grant of *certiorari* for the other reasons stated in the Petition.

658-59 (2d Cir. 2001) (internal citation and quotation marks omitted).

The Court in *Chin* also explained that while there was evidence which contradicted the claims made by the defendant about where and when the receipts were signed, and/or even whether the defendant was the one who signed the receipts at all, "[t]hese doubts about the ultimate reliability of the receipts, however, do not justify their exclusion under Rule 901's minimal standards for authentication." *Chin*, 371 F.3d at 38.

Here, in contrast, the Second Circuit erected a far higher barrier to admissibility, and one that violated both the standards for admission under Rule 901 as well as Ms. LaFontaine's Fifth Amendment right to present a defense. The Second Circuit rejected Petitioner's claim that the District Court had required too high a threshold of authenticity, and stated that "[t]he [District] Court invited LaFontaine to use alternative means to authenticate the tapes, but she failed to do so." *United States v. LaFontaine*, 2004 WL 260645, at *2 (2nd Cir. 2004) (App. 3-4).[4]

However, the District Court had, in fact, ruled that because it found "sufficient doubt" as to the authenticity of the tapes, "absent firsthand testimony by the person who made the document [the tape]," they would not be admitted.

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[4]"A." refers to the Second Circuit's opinion below, which was reproduced in the Appendix (as App. 1-25) annexed to the Petition for a Writ of *Certiorari* filed May 11, 2004.

Tr. 2163.[5]

Thus, here, both the District Court and the Second Circuit failed to adhere to the standard enunciated in *Chin*, which is that "Rule 901's requirements are satisfied 'if sufficient proof has been introduced so that a reasonable juror could find in favor of authenticity or identification.'" 371 F.3d at 38, *quoting United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999) (internal citation and quotation omitted).

Accordingly, *Chin* makes it clear, as Petitioner claimed below, that the District Court's concerns about authenticity reflected more appropriately on the *weight* of the evidence, and not its threshold admissibility. Indeed, the government had previously stipulated to the identity of the voice on the tapes, and any further dispute was a matter for the jury to decide.

As a result, the District Court's standard for authentication exceeded that required under Rule 901, and, in requiring Petitioner to call (without success) an unavailable witness in order to establish authentication, the District Court magnified its error. As a consequence, Rule 901's standards were misapplied, and Petitioner was deprived of her Fifth Amendment right to present a defense.

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[5] "Tr." refers to the trial transcript in the District Court.

## Conclusion

Therefore, for all the reasons set forth above, as well as those set forth in Petitioner's initial Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Dated: 10 August 2004
New York, New York

Respectfully submitted,

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